

APPEAL NO. 032527
FILED NOVEMBER 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 5, 2003. The hearing officer decided that respondent 1 (claimant herein) sustained a compensable injury; that the date of the injury was _____; that the appellant (carrier 1 herein) waived the right to dispute the compensability of the claimant's injury; and that the claimant had disability beginning on June 24, 2002, and continuing through the date of the CCH. Carrier 1 appeals, arguing that these determinations were contrary to the evidence. There is no response from the claimant or from respondent 2 (carrier 2 herein) to carrier 1's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he injured his back pushing boxes at work on _____. Carrier 1 contended that the claimant's back problems related back to a 1999 low back injury for which carrier 2 had coverage, or that the claimant's back problems resulted from playing soccer on either June 22 or June 23, 2002.

CARRIER WAIVER

Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. The hearing officer found that carrier 1 waived its right to dispute compensability, finding that carrier 1 received written notice of the claimant's injury on July 16, 2002, but did not dispute the claim for more than seven days. On appeal, carrier 1, without further explanation, simply asserts that this is not factually correct. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) from carrier 1, which is dated July 26, 2002, and which is file-marked as received by the Texas Workers' Compensation Commission by hand-delivery on September 20, 2002. This TWCC-21 states on its face that carrier 1 received written notice of injury on July 16, 2002, and that carrier 1 is denying the claim. The TWCC-21 supports the hearing officer's finding of waiver.

INJURY

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. We

have also held that the question of whether a claimant sustained a new injury or merely suffered from the continuation of a prior injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993; Texas Workers' Compensation Commission Appeal No. 950600, decided May 31, 1995. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). In light of the conflicting evidence concerning injury in the record, and applying this standard, we cannot say that the hearing officer erred as a matter of law in finding a compensable injury. In fact, in light of the finding of carrier waiver, it would have been error for the hearing officer not to find a compensable injury.

DATE OF INJURY

Date of injury is a question of fact. While there was conflicting evidence concerning the date the claimant was injured, there was evidence that the claimant's injury took place on _____. It was up to the hearing officer to resolve the conflicts in the evidence; and, under the standard of review set out above, we find no error regarding the hearing officer's date-of-injury determination.

DISABILITY

Disability is also a question of fact. While there was conflicting evidence concerning the duration of the claimant's disability, there was sufficient evidence to support the hearing officer's disability determination.

We affirm the decision and order of the hearing officer.

The true corporate name of insurance carrier 1 is **FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

The true corporate name of insurance carrier 2 is **ASSOCIATED CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**HAROLD FISHER, PRESIDENT
4320 EXECUTIVE CENTER DRIVE
SUITE 200
AUSTIN, TEXAS 78731.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Margaret L. Turner
Appeals Judge